WOOD, TRUSTEE IN BANKRUPTCY OF LECHE, *v.* A. WILBERT'S SONS SHINGLE AND LUMBER COMPANY AND WILBERT.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 61. Argued December 5, 1912.—Decided December 23, 1912.

Where defendant files a formal appearance and simultaneously files an exception to the jurisdiction, the two papers should be considered together, and as such cannot be regarded as a consent to submit to the jurisdiction in a case where consent is necessary.

An objection that the exception and demurrer did not comply with Rule 31 owing to failure to make affidavit that they were not interposed for delay, if not raised in the court below or assigned as error, cannot be raised in this court.

The District Court has not jurisdiction in behalf of the trustee in bankruptcy to recover assets of the bankrupt from a third person under a revocatory action allowed under the law of Louisiana, of an insolvent, without the consent of the defendant, under the Bankruptcy Act as amended by the act of February 5, 1903, c. 487, § 8, 32 Stat. 797.

This court will assume that all the amendments to different parts of the same act of Congress passed at the same time were intended not to conflict but to be in accord as provisions for different situations.

THE facts, which involve the construction of §§ 23a and 23b of the Bankruptcy Act and the jurisdiction of the District Court of the United States thereunder, are stated in the opinion.

Mr. Benjamin Rice Forman, with whom *Mr. William Lee Hughes* was on the brief, for appellant.

Mr. Clarence Samuel Herbert, with whom *Mr. Walter Guion* was on the brief, for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The case is here on a question of jurisdiction. Appellant brought suit in the District Court November 3, 1909, as trustee of one Edward Douglas Leche to set aside a sale of lands made by Leche to appellee, A. Wilbert's Sons Shingle and Lumber Company, herein called the shingle and lumber company, and to account for the rents thereof or the proceeds of the land that may have been sold, and to otherwise render a full account to appellant of the transactions with Leche, individually or otherwise.

Appellees on the third of December, 1909, filed an exception to the jurisdiction of the court, alleging as cause thereof that they were domiciled in the Parish of Iberville and that the court was without jurisdiction over their persons and over the subject-matter of the litigation. A demurrer to like effect was filed on the tenth of December and stated that it was "by way of amendment to the form of demurrer filed herein on December 3, 1909."

The demurrer was sustained. The court said: "From the oral arguments and brief filed it is evident the trustee brings his action under the provisions of section 70, subdivision e, of the bankruptcy act, and the bill does not disclose any cause of action under either section 60, subdivision b, or section 67, subdivision e, and therefore, by virtue of the authority of *Hull* v. *Burr*, 153 Federal, 945, this court has no jurisdiction to entertain the suit except by the consent of the defendants." The bill was dismissed without prejudice to complainant.

The certificate of the judge recites that the sole question decided by him and certified to this court was whether or not the District Court "has jurisdiction in behalf of the trustee in bankruptcy to recover assets of the bankrupt from a third person under a revocatory action allowed under the law of Louisiana, of an insolvent, without the consent of the defendant, under the Bankrupt Act as amended in 1903."

There are some minor questions presented by the brief

of counsel of which we must first dispose. It was contended in the court below that the appellees, by entering a formal appearance, waived their right to object to the jurisdiction. But they at the same time filed an exception to the jurisdiction, and the District Court decided that the two papers should be considered together, and, so considering them, held that they could not be regarded as a consent on the part of the defendants to submit themselves to the jurisdiction of the court. The ruling is not assigned as error. It is urged further that neither the exception nor the demurrer complied with the thirty-first equity rule, in that the appellees did not make affidavit that they were not interposed for delay. It is sufficient to answer that the objection was not made in the court below and is not assigned as error on this appeal. We therefore pass to the consideration of the question certified.

The bill charges with much circumstantial detail, which it is not possible to briefly state or analyze, that the lumber and shingle company and its president, Frederic Wilbert, had entered into a conspiracy with the bankrupt and certain other parties by which, on June 6, 1906, the shingle and lumber company acquired title to certain plantations belonging to the bankrupt situated in the Parish of Iberville, Louisiana. The purpose of the conspiracy, it is charged, was to conceal from his creditors the bankrupt's assets and property and to protect them from the pursuit of his creditors, with the understanding that when he got his discharge in bankruptcy the property was to be transferred to him. It was prayed that the sale be set aside and the defendants be decreed to convey the lands to complainant in trust for the creditors of the bankrupt. Without further detail of the bill we shall assume for the purpose of the consideration of the question that it states facts sufficient to constitute a ground of relief if the court have jurisdiction.

The Bankruptcy Act is very comprehensive of the whole subject of bankruptcy. It creates courts of bankruptcy and is full in its provisions for the collection and preservation of the estate of the bankrupt through trustees appointed by creditors who are given power to bring suits to recover the property of the bankrupt which has been conveyed by him in fraud of his creditors or to give a preference to any of them; the purpose of the act being to secure an equality of distribution of the assets of the bankrupt among his creditors.

Section 23a gives jurisdiction of such suits to the Circuit Courts of the United States which involve controversies at law or in equity, as distinguished from proceedings in bankruptcy, "in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts" and the "adverse claimants." By subdivision b of § 23 it is provided that suits by the trustee shall only be brought or prosecuted where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant; "*except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e.*" The words in italics were added as amendment by act of February 5, 1903, c. 487, § 8, 32 Stat. 797. Upon them the question in the case turns. Prior to the amendment, and passing on § 23 as originally enacted, this court decided in *Bardes* v. *Hawarden Bank*, 178 U. S. 524, that that section controlled and limited the jurisdiction of all courts over suits brought by trustees to collect debts due from third parties, or to set aside transfers of property to third parties alleged to be fraudulent against creditors, and that the District Courts of the United States could, by the proposed defendant's consent, but not otherwise, entertain jurisdiction of such suits. *Harris, Trustee,* v. *First National Bank of Mt. Pleasant*, 216 U. S. 382.

under section sixty, subdivision b, and section sixty-seven, subdivision e." These special exceptions exclude any other. And this is the view of the respective sections and their relation expressed in *Skewis* v. *Barthell*, 152 Fed. Rep. 534; *Palmer* v. *Roginsky*, 175 Fed. Rep. 883; *Parker* v. *Sherman*, 195 Fed. Rep. 648. *Contra: Hurley* v. *Devlin*, 149 Fed. Rep. 268.

Judgment affirmed.